APPEAL NO. 92116
FILED MAY 14, 1992

On February 27, 1992, a contested case hearing was held in _____, Texas, with (hearing officer) presiding. The issue before the contested case hearing was the identity of the employer of the claimant, at the time he was injured on the job, and, correspondingly, which carrier would be liable for payment of compensation.

(Hearing officer) determined that the respondent/claimant sustained a compensable injury in the course and scope of his employment as an employee of either (employee leasing co.), or (Company B), while working on behalf of (Company C). She found that appellant was liable for benefits as the insurer of employee leasing company, as well as insurer of Company B through an alternate employer endorsement to its policy. The hearing officer expressly found that respondent/claimant was not an employee of Company C because that employer did not have the right to control the details of his work.

The appellant has raised two points of error. It argues that the contract between Company B and Company C is silent as to the reservation of the right of control of employees provided to Company C, contrary to the finding of the hearing officer. Appellant notes that, this being the case, the actual control over claimant in the performance of his job has been demonstrated by the record to lie with Company C at the time of injury, and that the "borrowed servant" doctrine should be applied. Finally, appellant asks that we order the carrier for Company C to reimburse appellant for benefits that it has paid.

Respondent/claimant asks that the decision of the hearing officer be upheld, noting that one of the carriers is responsible for benefits. Respondent carrier for Company B argues essentially the same points argued by appellant regarding the contract between Company B and Company C, noting that there is no evidence that it was the employer, but that, if it is, appellant is still liable under the alternate employer endorsement to the workers' compensation insurance policy. Respondent carrier for Company C responds that Company B and its employees worked as independent contractors, and that the contract reserves right of control to Company B. This respondent also urges that all contracts be viewed as a whole, and that the transactions between the parties show that the intent of the parties was to have employees such as claimant covered under the workers' compensation insurance provided by employee leasing company through appellant.

DECISION

As we believe that the contract between Company B and Company C does not control who had the "right to control" respondent/claimant, we reverse and render a decision that Company C was the employer of claimant as its "borrowed servant" at the time of the injury, and that its carrier is liable for compensation. We are, however, without authority to order reimbursement to appellant by the liable carrier, as requested in the appeal.

The respondent/claimant injured his back on (date of injury), in the course of lifting

some steel which he was delivering for Company C. He stated that he worked for Company C as a result of being sent there by Company B which had hired him in October 1990. Respondent/claimant worked as a truck driver, drove trucks which he believed were owned by Company C, and wore safety equipment furnished by Company C. He had worked at Company C six months, and had previously been sent to other locations by Company B. He stated that he made from seven to 15 deliveries per day for Company C.

When asked originally by whom he was employed, respondent/claimant initially stated that he worked for employment leasing company. When questioned about how he was hired, however, respondent/claimant said he applied for work at the office of Company B, where he was hired by a man located there named RM. He stated that he did not know who employed RM. Respondent/claimant said that he never met anyone who worked for employee leasing company, to his knowledge; that he was directed initially to report to Company C by RM; that he thereafter reported to Company C to receive the day's assignment; and, that he was directly supervised there by DE, who worked for Company C. He testified that he was never supervised by the employee leasing company or by anyone from Company B. He stated that he was not aware that employee leasing company might be his employer until he received paychecks printed with its name.

Respondent/claimant stated that his paychecks were sent by Company B to Company C, where he received them. Any problems with checks, however, such as pay shortages, were reported to and handled by RM at Company B. Respondent/claimant stated that he understood that Company B had the power to hire and fire him, and stated, hypothetically, that if given different directions by RM and DE about where to report, he would follow the direction of RM. He was first sent to a doctor after his injury by RM.

CH, the adjuster for appellant, testified that employee leasing company, under the name of (employee leasing co.) was insured for workers' compensation insurance by appellant for the period from December 7, 1990 through December 7, 1991. She confirmed that Company B was endorsed on this policy as an alternate employer, and that appellant would accept liability for claimant's benefits if Company B were determined to be the employer. CH stated that a predecessor employee leasing company, under the name of (employee leasing co.'s old name) had been insured beginning in September 1990, and that an alternative employer endorsement on that policy included not only Company B, but Company C as well. CH said that this rider had "expired" by the respondent/claimant's date of injury because StafTex became (employee leasing co.'s new name), although she did not know any of the details concerning expiration of the previous policy. CH stated that it was her understanding that Company B hired the respondent/claimant, then leased him to Company C. She stated that appellant was not aware under this new policy that Company B would be in the business of leasing employees to Company C.

BB testified that Company B was not in the employee leasing business, but rather in the labor contracting business. He stated that they obtained workers for their client businesses through subcontracting, and that employee leasing company was one of their

subcontractors. BB said that a contract originally executed with (employee leasing co.'s old name) on August 27, 1990, was assigned to (employee leasing co.'s new name) when the company's name changed. BB stated that the contract with Company C, executed August 30, 1990, required that the workers' compensation insurance provided through

appellant include an alternate employer endorsement naming Company C, and that Company C had specifically requested this provision. BB noted that he had required that Company B's contract with Company C be expressly incorporated into the (employee leasing co.) contract.

BB testified that he was not aware at all that Company C had been dropped from the alternate employer endorsement until appellant denied coverage to another employee, and that he would not have continued to do business with employee leasing company if he had realized this. BB stated that RM had hired respondent/claimant, and that RM was an employee of employee leasing company who was "leased back" to Company B. However, he unequivocally denied that respondent/claimant was an employee of Company B. He stated that no one from Company B ever supervised or directed respondent/ claimant in his work, regardless of what either contract says.

BB stated that he understood that the president of employee leasing company, Mr. F, was also an insurance agent for appellant. He stated that Mr. F told him that employees provided to Company C would be covered under appellant's policy. He did agree, however, that the endorsement including Company C was not effective when respondent/claimant was injured.

CH was recalled to affirm that Mr. F was not an agent for appellant. A letter in the record from the assigned risk pool (Texas Workers' Compensation Insurance Facility) dated February 1, 1991, instructs Mr. F to cease issuing Certificates of Insurance in appellant's name on behalf of employee leasing company.

Although not allowed by the hearing officer to have party status, the attorney for employee leasing company recited on the record that his company was willing to accept liability for the claim and that appellant was acting against its position.

The provisions of the contract between Company B (described as "Contractor" therein) and Company C (described as "Company" therein), insofar as reference is made to a person in the position of respondent/claimant, are as follows:

I. Service to be Performed

The Contractor agrees to furnish personnel, as requested, by the Company, from time to time, to perform services for the Company. Such personnel are sometimes referred to as an "employee" of Contractor. The Company reserves the right to furnish such equipment or additional safety supplies

> which it deems appropriate for the job. All personnel furnished to Company under the contract will be employees of Contractor or of [employee leasing company] subject to the provisions of Section 8 below. Should Company desire to hire any of the personnel provided to Company by Contractor, then such person will be released by Contractor upon Company's written request, as soon as a replacement can be hired by Contractor, if it desires to hire a replacement.
>
> 7. Independent Contractor
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> The Contractor is and shall be an independent contractor.

Section 8 of the Contract gives permission to Company B to subcontract employees through employee leasing company. This provision notes: . . . All personnel which are hereafter provided by Contractor to Company under the Contract will be provided by (employee leasing co.) to Contractor, under a separate agreement solely between (employee leasing co.) and Contractor. Such personnel will be employed by (employee leasing co.), such personnel will be employees of (employee leasing co.), and such personnel shall be carried on the payroll and paid by (employee leasing co.). (Employee leasing co.) shall pay all of the taxes and benefits of its said employees . . .

This contract also obligates employee leasing company to provide workers' compensation insurance coverage and an alternate employer endorsement for Company C. We will briefly note here, without a full recitation of provisions contained therein, that the contract between employee leasing company and Company B delegates supervision and control of leased employees to Company B.

The facts in this case are substantially those of the situation described in Texas Workers' Compensation Commission Appeal No. 92053 (Docket No. BU/91140558/02-CC-BU31) decided March 27, 1992. While the contract here contains the further bare provision that Company B is an independent contractor, we find that this provision alone, given the contract as a whole together with the testimony of BB, who signed the contract, is insufficient as a reservation of the right to control employees provided to Company C.

Although respondent/carrier for Company B asserts that Texas Workers' Compensation Commission Appeal No. 92053 holds that the magic words "right of control" must be used in a contract, this is not accurate. As the case law cited in that decision indicates, however, there must be some express language allocating the right to direct or supervise employees that may be provided to another employer. The hearing officer erred by holding that designation of persons as "employees" necessarily constitutes reservation of the right of control, a position which goes against case law.

Texas courts recognize that an employee of one employer may become the borrowed servant of another. Sparger v. Worley Hospital, Inc., 547 S.W.2d 582 (Tex.

1977); Carr v. Carroll, 646 S.W.2d 561 (Tex.App.-Dallas 1982, writ ref'd n.r.e.).

When both employers are operating under a contract, a court can dispose of the borrowed servant issue without the necessity of considering the facts and circumstances of the project only if that contract clearly and expressly assigns the right to control. Bucyrus-Erie Co. v. Fogle Equipment Corp., 712 S.W.2d 202 (Tex. App.-Houston [14th Dist.] 1986, writ ref'd n.r.e.).

In Sanchez v. Leggett, 489 S.W.2d 383 (Tex. Civ. App.-Corpus Christi 1972, writ ref'd n.r.e.), two oil field contractors agreed to loan their employees to each other when either was in need. All matters as to pay, taxes, and the like, remained with the primary employer of the employee. That court said in holding that the borrowing contractor was responsible for injury to a borrowed employee based on the facts of the case:

> Although it is undisputed that the two employees had a contract that determined the employment status as between themselves and their employees, the contract did not contain the "magic" provision that determined the question of "right to control" the borrowed employee.

The requirement that "right to control" be expressly provided for in the contract is set forth as recently as Archem Co. v. Austin Industrial, Inc., 804 S.W.2d 268 (Tex. App.-Houston [1st Dist.] 1991, no writ) which cited Sanchez in calling for an express provision as to right to control. This case further noted that the gratuitous provision of workers' compensation benefits does not itself establish the employee/employer relationship.
Also see Texas Workers' Compensation Commission Appeal No. 91014 (Docket No. FW-00008-91-CC-3) decided September 20, 1991; and Texas Workers' Compensation Commission Appeal No. 91043 (Docket No. WA-00009-91-CC-2) decided December 9, 1991 as to right to control.

Even when express provision of the right to control is set forth in a contract, the facts and circumstances may still be considered in determining "right to control." Highlands Underwriters Ins. Co. v. Martinez, 441 S.W.2d 666 (Tex. Civ. App.-Waco 1969, writ ref'd n.r.e.). In this case the contract in question provided that all work "shall meet with the approval of Humble's engineers . . . but that the detailed manner and method of doing same shall be under the control of Contractor, Humble being interested only in the result . . . ." When the claimant argued that Highlands did not plead that the written contract was a subterfuge or had been abandoned, this court said that such a pleading was not necessary, citing Newspapers, Inc. v. Love, 380 S.W.2d 582 (Tex. 1964). Martinez held the contract not to be conclusive saying that there was ". . . unquestionable adequate evidence of the conduct, custom and practice of the parties 16 years after the written contract was made to raise a fact issue . . . [as to borrowed servant]."

Simply denominating individuals as one's "employees" does not equate to reservation of a right to control the details of their work, most especially under the facts of

this case. Evidence at the hearing that respondent/claimant only took orders from Company C, that no other employer in question ever supervised him prior to the accident or furnished any tools to him, that Company B hired him and directed him to Company C, and that employee leasing company paid his wages, along with stunning testimony of the president of Company B that the contract did not reflect the actual relationship of the companies to respondent/claimant, would call for examination of the "conduct, custom, and practice" involved in addition to analysis of the contract. Martinez and Love, *supra*.

The fact that Company B sent respondent/employer to the doctor, or that Company C contracted to have workers' compensation coverage provided through appellant, will not defeat applicability of the "borrowed servant" doctrine to these facts. *See* Marshall v. Toys-R-Us Nytex Inc., 825 S.W.2d 193 (Tex. App.- Houston [14th Dist.] 1992, no writ).

Notwithstanding the recitation in the contract that Company B "is" an independent contractor, this appears not to have been the case in fact with respect to employees sent to Company C. Even if it could be argued that Section 7 acted as some reservation of the right to control, this provision would not apply to respondent/claimant as he was actively disavowed as an employee of Company B. Appellant's point that the contract between Company B and Company C does not control the issue of borrowed servant, is correct.

While the hearing officer in "Discussion" of this case acknowledged that working employer exercised actual control over details of respondent's work, the contract was viewed as controlling. Based on the contract, the hearing officer made Findings of Fact 2 and 3:

2.(Company C) did not have the right to control the details of Claimant's work.

3.Either [employee leasing co.] or [Company B] had the right to control the details of Claimant's work.[1]

From the evidence of record, and applying the law to the facts of this case, we conclude that Finding of Fact 2 and Finding of Fact 3, and Conclusion of Law No. 2, are erroneous as a matter of law, because the respondent/claimant became a "borrowed servant" of Company C. Because the evidence was overwhelming that Company C exercised control over respondent, we see no reason to remand for further development of the evidence, and accordingly render a decision that, at the time of injury, the respondent/claimant was the borrowed servant of Company C, and order that its insurance carrier pay all applicable workers' compensation benefits in accordance with

[1] We would observe that such alternative findings of fact are to be avoided, and could, under some circumstances, amount to reversible error for failure to clearly decide issues before the tribunal.

the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Art. 8308-1.01 *et seq*. (Vernon Supp. 1992), and Rules of the Texas Workers' Compensation Commission.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Philip F. O'Neill
Appeals Judge